

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of)

Petition for Declaratory Ruling to Clarify)
Provisions of Section 332(c)(7)(B) to Ensure)
Timely Siting Review and to Preempt under)
Section 253 State and Local Ordinances that)
Classify All Wireless Siting Proposals as)
Requiring a Variance)

WT Docket No. 08-165

**RESPONSE OF THE CITY OF SCOTTSDALE, ARIZONA TO COMMENTS
FILED BY T-MOBILE USA, INC.**

This Response is filed by the CITY OF SCOTTSDALE, ARIZONA ("Scottsdale") in response to Comments submitted on September 29, 2008 by T-Mobile USA, Inc. which refer to Scottsdale as an example of why rulemaking is needed. Scottsdale hereby advises the Commission that the comments of T-Mobile mischaracterize Scottsdale's process and its efforts to process wireless facility applications in a reasonable manner. As described below, Scottsdale's efforts to process applications within a reasonable time frame serve to confirm the wisdom of Congress in choosing to require that applications be acted upon in a reasonable time rather than setting forth specific time frames which do not account for the complexities of wireless facility applications and the balancing of legitimate municipal and community interests where such facilities are located.

1. Scottsdale's Process:

In some jurisdictions, applications for facility siting may be addressed administratively, without the need for public hearings. Others are required by state and local law to follow certain processes and procedures. The City of Scottsdale has a specific ordinance addressing wireless communication facilities (WCF) that was enacted on March 4, 2003. The ordinance was the culmination of a two-year project by residents and wireless industry representatives after presentations and discussion at five (5) Planning Commission hearings and one (1) City Council hearing. It requires WCF applications to be reviewed and approved through a planning and development process.

In many instances, Scottsdale's ordinance requires certain notice and public hearings to ensure that the rights of the public are preserved in addition to those of the applicant. Specifically, the City of Scottsdale requires all WCF applicants to provide notice to residences, businesses, schools, and public facilities within 750 feet of the proposed WCF site. This notification is required to be mailed at least 15 days prior to the submittal of the application. When a public hearing is required, public hearing notice signs are posted on the site and newspaper legal ads are printed at least 15 days prior to the scheduled hearing date.

2. Scottsdale's Handling of Applications.

The average time for processing applications in Scottsdale (from application submittal to zoning approval) is 90 days, which is reasonable and suggests that further rulemaking is not necessary. However, some applications will necessarily take more time than average for reasons such as improper submittal, controversial nature of the proposed location, the application is not consistent with the zoning, or a possible flood of applications overburdening City staff (Scottsdale has experienced more than 100 applications filed in our city in the past 2 and one half years), etc.

Thus, while the City endeavors to process all applications in a reasonable time as already required by Congress, it is unreasonable to impose a blanket time limit upon all applications which does not account for variations in the nature and extent of the individual applications. Such a provision would frustrate the intent of Congress which has already recognized this fact by choosing to adopt a reasonableness standard in the legislation rather than a specific time limit.

The City of Scottsdale is dedicated to providing excellent customer service to all of its applicants. To date and to my knowledge, we have not received any formal complaints or legal challenges to our application processing timelines or procedures. We firmly believe the current federal legislation that already requires the City to process applications in a reasonable time has not been burdensome to the industry and further restrictions on cities and towns is neither fair nor necessary to allow the industry and the City to work in a cooperative manner to ensure fair access while allowing the City to reasonably maintain its zoning and aesthetic standards.

3. Response to T-Mobile's Comments.

On page 8 of the comments submitted by T-Mobile USA, Inc. ("T-Mobile"), Scottsdale is identified and described as one of six examples of "unreasonable delays experienced by T-Mobile." T-Mobile's comments do not accurately characterize the City of Scottsdale and are based on an incomplete set of facts. As described in the previous section, Scottsdale has processed and approved many applications for WCF within the City in a timely and reasonable fashion.

The example cited by T-Mobile in its comments concerned a proposed site located on a lattice tower owned by a local utility at a major intersection in the northern part of Scottsdale. T-Mobile claims that "[o]ver a two year period, [Scottsdale] has sent the application back to the beginning of the process three times and refuses to move forward and make a final determination." This is inaccurate.

T-Mobile filed an application for a conditional use permit in August, 2005 for a WCF site on the utility's lattice tower within the recommended study boundary of an area identified for future preservation. The application proceeded through Scottsdale's Design Review Board and Planning Commission hearings. Upon consideration by the City Council, T-Mobile was asked to investigate possible options for an alternate location. The City then advised T-Mobile of two suggested alternate locations. T-Mobile pursued one of those suggestions and submitted an application which received staff approval in August, 2006. However, T-Mobile was unable to negotiate successful lease terms with Scottsdale's Asset Management Department and informed City staff of that fact in 2007.

In early 2008, T-Mobile approached Planning and re-submitted the first application for the site on the utility's tower. T-Mobile then revived negotiations for a lease agreement for the suggested alternative site. A lease agreement for the alternate site was reached and approved by the City Council on its August 18, 2008 consent agenda. The zoning case is not unresolved as suggested by T-Mobile. In fact, the zoning approval for the alternative site was completed within a few months of the completed pre-application for this site.

At no time did the City act in bad faith or seek to unreasonably delay T-Mobile's acquisition of a site for its WCF. If anything, this exception to the normal process confirms what Congress recognized when it enacted the legislation – location of WCF's within a carefully planned municipality involves a delicate balance between the City's obligation to preserve its character and aesthetic qualities on behalf of its citizens while recognizing the right of a wireless telecommunications provider to seek to locate WCF sites within the City. Ultimately, both interests were preserved when T-Mobile's application and lease was approved for the alternate location. Because so many different factors apply on a case by case basis, Congress chose to impose only a reasonable time requirement, rather than "a one size fits all" specific time limit.

Both the public and private interests were served in this case even though T-Mobile's ultimate approval was atypically long. However, there is nothing to suggest that T-Mobile was without a remedy under the existing legal framework. Section 332 (c)(7)(B)(v) of the Act provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government

act or failure to act that is inconsistent with clause 332(c)(7)(B)(iv) may petition the Commission for relief. It is worthwhile to note that T-Mobile did not seek remedies under either of these provisions despite the fact that it now suggests Scottsdale acted unreasonably. If Scottsdale really acted unreasonably, T-Mobile could have availed itself of these special legal remedies.

4. Conclusion.

In conclusion, T-Mobile has improperly referred to the City of Scottsdale, Arizona as an example of why the Commission should adopt the proposed rule. Scottsdale processes all WCF applications in good faith with cognizance of the Congressionally mandated requirement of reasonableness. One aberration due to unique facts and circumstances does not support the adoption of a fixed "one size fits all" time frame. Rather, this supports what Congress has already recognized: the rules must be flexible to allow the competing interests of the wireless provider and the public to be fairly balanced.

The current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mary Manross", written over a horizontal line.

Mary Manross, Mayor
City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251
480-312-2433